No. 91-1265

APR 9 1992

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JAMES BELHUMEUR, *et al.*,
Petitioners,

v.

MASSACHUSETTS LABOR RELATIONS COMMISSION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Judicial Court of Massachusetts

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BRIEF IN OPPOSITION FOR RESPONDENTS MASSACHUSETTS TEACHERS ASSOCIATION AND NATIONAL EDUCATION ASSOCIATION

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QUESTION PRESENTED

Whether the Supreme Judicial Court of Massachusetts erred when it concluded that the financial information sent to nonmember employees prior to the collection of agency fees—which included lists of the major categories of respondent unions' expenses that were verified by an independent auditor and that identified which of those expenses respondent unions considered legally chargeable and legally nonchargeable to objecting nonmember employees—satisfies the footnote reference in *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 307 n.18 (1986), to "verification by an independent auditor." *

* Petitioners precede their statement of the Question Presented with a reference to *Hudson*, in which they assert that "*Hudson* requires unions to provide nonmembers with a 'certified public accountant's verified breakdown of expenditures.'" Petition for a Writ of Certiorari at i (citing 475 U.S. at 310). We note in passing that this statement in *Hudson* was not directed toward the adequacy of the financial information that is sent to nonmember employees prior to the collection of agency fees, which is the issue presented by the Petition. To the contrary, the Court at that point in *Hudson* was discussing the requirement of "an escrow for the amounts reasonably in dispute while . . . challenges are pending," *id.* at 310, and in that context the Court indicated what the escrow obligation would be "[*i*]*f, for example*, the original disclosure by the union had included a certified public accountant's verified breakdown of expenditures," *id.* (emphasis added).

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Respondents Massachusetts Teachers Association and National Education Association file this brief in opposition to the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

A. The Background Facts

Petitioners are teachers in various public school districts in Massachusetts or faculty members at the University of Massachusetts, which is a public-sector institution. In all of these school districts and at the University of Massachusetts, a local education association ("local association") that is affiliated with the Massachusetts Teachers Association ("MTA") at the state level and the National Education Association ("NEA") at

the national level is recognized as the exclusive bargaining representative for the bargaining units comprised of the teachers or faculty members. (The local associations, MTA and NEA are sometimes hereinafter collectively referred to as the "Associations.") Although petitioners are members of these bargaining units, they chose not to join their respective local associations during the 1987-88 or 1988-89 school years. *See* Appendix to Petition ("App. P.") at 12a.

In their capacity as exclusive representatives, the local associations entered into collective bargaining agreements with their respective school districts and the University of Massachusetts for the 1987-88 and 1988-89 school years. As permitted by Massachusetts law—specifically, Mass. Gen. L. ch. 150E, § 12—each of these collective bargaining agreements contained a provision requiring employees in the bargaining unit who were not members of the exclusive representative to pay an agency fee for services rendered by the exclusive representative and its affiliated organizations. Pursuant to these provisions, the local associations charged petitioners an agency fee for the 1987-88 and 1988-89 school years. App. P at 2a.

To collect those agency fees, the local associations followed a procedure that was adopted by MTA to govern fee collections from all nonmember employees in Massachusetts who were subject to an agency fee provision involving one of MTA's affiliated local associations. As the first step in that procedure, each nonmember employee was provided with an informational package explaining how the relevant local association, MTA, and NEA each calculated its portion of the agency fee. After receiving the informational package, each nonmember employee had a period of thirty days within which to file a written objection to the amount of the agency fee. If a nonmember employee objected, the entire amount of his or her agency fee was placed in an escrow account until

an impartial decisionmaker issued a decision on the exact proportion of the fee that was lawfully chargeable to objecting nonmember employees. Appendix in the Supreme Judicial Court of Massachusetts ("App. MSJC") at 449.

Because the Question Presented by the Petition concerns the adequacy of the financial data that was provided to nonmember employees, we describe below the relevant documents that were included in the informational package.[1]

1. *Local Associations* [2]

The local association portion of the informational package included two documents. One document was a copy of the local association's basic financial statements for the 1987-88 fiscal year. These statements, which showed the major categories of the local association's expenses, were verified by an independent auditor.[3]

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[1] The Associations based their agency fees for both the 1987-88 and 1988-89 school years on financial data for the 1987-88 school year. *See Chicago Teachers Union v. Hudson*, 475 U.S. 292, 307 n.18 (1986) ("the Union cannot be faulted for calculating its fee on the basis of its expenses during the preceeding year"). Accordingly, only the adequacy of the financial disclosure for 1987-88 is at issue.

[2] Although there is some variation in the financial data that was provided by the local associations, *see* App. MSJC at 754-996, these variations are not relevant to the Question Presented by the Petition. The description in text therefore is generalized to reflect the financial data that was provided by most of the local associations.

[3] This is true of all of the local associations whose portion of the agency fee is at issue in the Petition. Three additional local associations that initially were included in these proceedings did not provide audited financial statements of their major categories of expenses, and the Massachusetts Labor Relations Commission issued complaints against these three local associations. App. P. 19a n.7. The financial disclosure provided for the local association portion of the agency fee for these three local associations was not

The other document provided to nonmember employees was entitled "Fee Explanation," and demonstrated how the local association calculated its share of the agency fee. The Fee Explanation broke the local association's expenses into eighteen separate categories (such as Contract Negotiations, Grievances/Arbitrations, Publications, Social Activities, Conventions/Workshops/Meetings, etc.), described each category, and indicated whether and to what extent the category was chargeable or nonchargeable to objecting nonmember employees. The process followed to compute the reduced agency fee was explained in narrative form on the first page of the Fee Explanation. The Fee Explanation, which typically was prepared by the local association treasurer, was not subjected to an independent audit. *See* App. MSJC at 202-12.

2. *MTA*

The informational package also included a copy of MTA's basic financial statements for the 1987-88 fiscal year. These statements, which showed the major categories of MTA's expenses, had been subjected to an independent audit by the certified public accounting firm of Arthur Young.

In order to provide a more detailed picture of MTA's expenses, the auditor prepared a Schedule of Total Costs by Department, and this document also was included in the informational package. The Schedule of Total Costs by Department broke expenses into MTA's six service divisions: Affiliate Services, Legal Services, Governmental Services, Communications, Professional Development, and Research. It then broke these expenses down even further into programs within each division, and described each program. Each program in turn was

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included in the appeal to the Massachusetts Supreme Judicial Court, is not included in the Petition, and is not included in the references in this Brief in Opposition to the local association portion of the informational package.

broken into sub-programs and each sub-program was again described. All in all, MTA's activities were broken down into just under one hundred expenses, each one described, and this breakdown was audited by Arthur Young. MTA then allocated each of the latter expenses as chargeable or nonchargeable to objecting nonmember employees. The auditor supplied an explanation of the basis for MTA's allocation, reciting that MTA had relied upon "the rules and regulations of the Massachusetts Labor Relations Commission for determining permissible or chargeable costs, and impermissible or nonchargeable costs," but that the chargeable/nonchargeable allocation itself was unaudited.

Nonmember employees were in addition provided with a narrative statement explaining how MTA calculated its share of the agency fee. App. MSJC at 231-83.

3. *NEA*

With regard to NEA's portion of the agency fee, nonmember employees were provided with a copy of NEA's basic financial statements for the 1987-88 fiscal year. These statements, which listed NEA's major categories of expenses, had been subjected to an independent audit by the certified public accounting firm of Coopers & Lybrand.

Also included for NEA was a Supplemental Schedule of Agency Fee Chargeable and Nonchargeable Expenditures. This Supplemental Schedule, which had been audited by Coopers & Lybrand, provided each nonmember employee with a breakdown of NEA's chargeable expenses by program and administrative area, and the accompanying auditors' notes described each program and area and set forth the criteria that NEA had used to allocate its expenses as chargeable and nonchargeable. The auditors confirmed that NEA had in fact expended the amounts claimed as chargeable and nonchargeable, but did not certify the accuracy of the allocation itself.

Finally, nonmember employees received a document entitled "How NEA Calculates Its Agency Fee Chargeable/Nonchargeable Expenditures." This document set forth in narrative form the criteria that NEA used to determine chargeable and nonchargeable expenses, and the procedure that it used to calculate its share of the agency fee. App. MSJC at 341-92.

For purposes of the Question Presented in the Petition, two points concerning the financial data that was provided to nonmember employees in connection with the demand by the Associations for the payment of agency fees are of particular relevance:

1. Each local association, MTA, and NEA provided nonmember employees with a copy of their basic financial statements for the 1987-88 fiscal year. These statements, which listed the major categories of each association's expenses, were verified by an independent auditor.

2. Each local association, MTA, and NEA provided nonmember employees with a detailed breakdown of their expenses into chargeable and nonchargeable categories, and explained the basis for the allocation. The accuracy of the chargeable/nonchargeable allocation was not verified by an independent auditor for the local associations, MTA, or NEA,[4] in the sense that the auditors did not themselves separate chargeable from nonchargeable expenses "[p]ursuant to proper guidelines founded on established legal considerations." Decision of the Supreme Judicial Court of Massachusetts, App. P. at 5a.

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[4] As noted, NEA's Supplemental Schedule of Agency Fee Chargeable and Nonchargeable Expenditures was independently audited, thus verifying that the funds in fact were expended for the purposes indicated.

B. The Decisions Below

1. *The Massachusetts Labor Relations Commission*

These proceedings began when petitioners filed prohibited practice charges with the Massachusetts Labor Relations Commission ("Commission") against the local associations that were recognized as their exclusive representatives. The charges, which were substantially identical, challenged the validity of the demands made by the local associations for payment of agency fees for the 1987-88 and 1988-89 school years on the ground, *inter alia*, of the alleged inadequacy of the financial data provided with the demands. Citing *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 307 n.18 (1986), which stated that "adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor," petitioners argued that, when demanding payment of an agency fee, the accuracy of the allocation of union expenses as chargeable or nonchargeable must be verified by an independent auditor. They contended that the demands in this case were invalid because the Associations had failed to comply with this alleged constitutional prerequisite. App. P. at 12a-13a.

The Commission disagreed. Noting that the local associations, MTA, and NEA all had provided nonmember employees with, *inter alia*, audits of their basic financial statements, which listed the major categories of the Associations' expenses, the Commission held that nonmember employees had received adequate information to enable them to decide whether to object to the agency fee, and that this "satisfied *Hudson*'s information requirement." App. P. 17a. In this regard, the Commission emphasized that:

> Fee payers remain entitled to test, in subsequent hearings, both the legitimacy and the accuracy of the union's determinations about how much it spent on chargeable and nonchargeable activities. [*Id.*]

2. *The Supreme Judicial Court of Massachusetts*

On appeal to the Supreme Judicial Court of Massachusetts, petitioners again argued that their "First Amendment rights have been violated because no independent auditor has certified to the correctness of the allocation of chargeable and nonchargeable expenses, on the basis of which each union determined the agency service fee it charged." App. P. at 2a. The Supreme Judicial Court rejected this argument, and affirmed the Commission's "determination to dismiss the plaintiffs' charges and not to issue complaints on them insofar as those charges are based on the absence of an independently audited verification of a union's separation of chargeable from nonchargeable expenses." *Id.* at 3a. The court noted that "[t]hat position has been rejected in every Federal Circuit Court of Appeals that has passed on it." *Id.*

Although the court below observed that, "[p]ursuant to proper guidelines founded on established legal considerations, an auditor could probably do a satisfactory job of properly separating chargeable from non-chargeable expenses," *id.* at 5a, the "crucial question," the court said, "is not . . . whether an independent audit would be a good idea,[5] but rather whether the First Amendment rights of agency service fee payers can be protected only if a report of such independent audit accompanies a union's demand for payment of an agency service fee," *id.* The Supreme Judicial Court answered this question in the negative.[6] Like the Commission, the court relied for

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[5] Petitioners misstate the position of the Supreme Judicial Court when they assert, on the basis of this "open question," that the court recognized that "an audit of the unions' chargeable vs. nonchargeable cost allocations . . . would likely be a 'good idea.'" Petition at 12.

[6] Although, as petitioners note, the court below concluded that "the language [in footnote 18] of the *Hudson* opinion is incon-

this answer on the distinction between the threshold requirement in *Hudson* that nonmember employees be provided with an explanation of the basis for the agency fee sufficient to enable them to determine whether or not to object, and the subsequent *Hudson* requirement that an objecting nonmember employee have the opportunity to challenge the amount of the fee before an impartial decisionmaker. As the court put it:

> The information that the union must provide under the *Hudson* opinion [at the explanation stage] is not intended to be dispositive of any dispute. That information is designed only to permit an agency fee payer to decide whether to oblige the union to prove before an independent fact finder that the agency fee charged was properly determined. Information from an audit of chargeable and nonchargeable expenses might be helpful in making that decision, but it would not be conclusive, and in our judgment is not necessary to provide the First Amendment protections considered in the *Hudson case.* [App. P. at 7a.]

REASONS FOR DENYING THE WRIT

In *Hudson*, this Court set forth certain requirements that a procedure for the collection of agency fees must meet in order to pass constitutional muster, including "an

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clusive," App. P. at 6a, it did offer the following observation as to the relevant language:

> Footnote 18 says in part that 'adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor.' The requirement stated in that footnote of 'verification by an independent auditor' does not tell us clearly what is to be verified. It seems to be merely verification of 'the major categories' of expenses, and, if so, that requirement does not aid the plaintiffs' argument for an independent audit separating chargeable and nonchargeable expenses within categories of expenses. [*Id.* at 6a n.4.]

adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." 475 U.S. at 310. In this case, petitioners raise a question about the application of the first of these requirements to the Associations' procedure, but this question does not warrant consideration by this Court.

The threshold obligation that *Hudson* imposes upon a union that seeks to collect agency fees is to provide all nonmember employees with *"an adequate explanation* of the basis for the fee." *Id.* (emphasis added). *See id.* at 306 (nonmembers must "be given sufficient information to gauge the propriety of the union's fee"); *id.* (it is inadequate to "leav[e] the nonunion employees in the dark about the source of the figure for the agency fee").

The Court in *Hudson* also specified the information that a union must distribute to nonmember employees in order to meet this requirement. The Court initially stated that a union must "identify[] the expenditures for collective bargaining and contract administration that [are] provided for the benefit of nonmembers as well as members—and for which nonmembers as well as members can fairly be charged a fee." *Id.* at 306-07. In subsequent footnotes, the Court elaborated on this general standard, first characterizing the union's obligation to provide information to nonmember employees as a "limited notice requirement" that should not impose an "undue burden" on the union, *id.* at 306 n.17, and then stating that a union "need not provide nonmembers with an exhaustive and detailed list of all its expenditures," *id.* at 307 n.18. *See id.* (there necessarily exist "practical reasons why '[a]bsolute precision' in the calculation of the charge to nonmembers cannot be 'expected or required' ") (quoting *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963), and *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 239-40 n.40 (1977)). Finally, and of particular relevance here, the Court indicated in a footnote that "adequate disclosure

surely would include the major categories of expenses, as well as verification by an independent auditor." 475 U.S. at 307 n.18.

Petitioners contend that this latter reference in footnote 18 of *Hudson* to "verification by an independent auditor" means that an auditor must determine at the explanation stage of the collection procedure whether a union accurately has categorized its expenses as legally chargeable and legally nonchargeable, and that the Supreme Judicial Court of Massachusetts ignored this alleged constitutional requirement when it "refused to require an audit of the union's chargeable vs. nonchargeable cost allocations." Petition at 12. There is no merit to this position, and the ruling by the court below is plainly correct.

The primary purpose behind *Hudson*'s explanation requirement is to ensure that a nonmember employee has sufficient information to decide whether or not to object to the amount of the agency fee. In order to make this decision, the Court in *Hudson* indicated that a nonmember employee should be provided with two types of information. First, a nonmember employee needs financial data that sets forth the actual amount of expenditures in each of the union's "major categories of expenses," which information the Court stated should be verified by an independent auditor to ensure its accuracy. 475 U.S. at 307 n.18. In addition, the nonmember needs to know which major categories of expenses, and what amounts within these categories, the union believes to be lawfully chargeable to objecting nonmember employees—*i.e.*, the union should "identif[y] the expenditures for collective bargaining and contract administration that [are] provided for the benefit of nonmembers as well as members —and for which nonmembers as well as members can fairly be charged a fee." *Id.* at 306-07. With this information in hand, the nonmember employee will be able to

make an informed decision on whether to object to the amount of the agency fee being charged by the union.[7]

Thus, notwithstanding petitioners' argument to the contrary, there is nothing in footnote 18 of the *Hudson* decision to suggest that an independent auditor is required to verify the accuracy of a union's breakdown between legally chargeable and legally nonchargeable expenses. Indeed, such an interpretation of footnote 18 would be at odds with the subsequent requirement in *Hudson* that the accuracy of the agency fee be determined by an "impartial decisionmaker."

As noted, *Hudson* requires *both* "an adequate explanation of the basis for the fee" *and* "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker." The purpose of the explanation is not, as petitioners maintain, "to insure that the union's reduced fee calculations are reasonably accurate," Petition at 17, or to provide "pre-collection assurance that the amount of money about to be seized from agency fee payers has been accurately calculated and verified," *id.* at 13 n.11. Its purpose is rather to provide the nonmember employee with sufficient information to decide whether or not to file an objection. *Hudson*, 475 U.S. at 306; *Gwirtz v. Ohio Education Ass'n*, 887 F.2d 678, 682 (6th Cir. 1989), *cert. denied*, 494 U.S. 1080 (1990); *Dashiell v. Montgomery County*, 925 F.2d 750, 758 (4th Cir. 1991); *Damiano v. Matish*, 830 F.2d 1363, 1370 (6th Cir. 1987); *Gilpin v. AFSCME*, 875 F.2d 1310, 1316 (7th Cir.), *cert. denied*, 493 U.S. 917 (1989). As the Seventh

[7] To be sure, the obligation imposed on a nonmember who decides to file an objection to the amount of the fee should not be burdensome. That is why, after receiving the required information, the nonmember who wants to object to the fee is merely required "to make his objection known." 475 U.S. at 306 n.16. And the information needed to make such a general objection is obviously much less than would be the case if the objector were required to specify the basis for his or her objection or to identify particular expenses to which he or she objected.

Circuit recently explained, it is an "impartial decisionmaker," and *not* an auditor, who determines whether the amount claimed by the union is, in fact, accurate:

> The proper procedure employs each of the three prerequisites identified by the Supreme Court: the fair share notice provides the basis for a challenge to the fair share fee assessment; *the impartial decisionmaker determines the correctness of the fee amount;* and the escrow protects the challengers' funds pending such a decision.

Hudson v. Chicago Teachers Union, 922 F.2d 1306, 1314 (7th Cir.) (emphasis added), *cert. denied*, 111 S. Ct. 2852 (1991). As in the latter case, petitioners' challenge in this case

> mistakenly equates the adequacy of the notice with the accuracy of the fee assessment, *Hudson*, 699 F. Supp. at 1340, and thus squarely contradicts *Hudson*'s holding and rationale.

Id. Accepting petitioners' argument "would in effect render redundant and irrelevant the requirement that an impartial decisionmaker hear the dispute." *Id.*

The Fourth Circuit in *Dashiell* likewise relied on this important distinction in holding that an auditor need not "review the Union's initial allocation decision," 925 F.2d at 756, or "review or verify whether a particular article [is] chargeable," *id.* at 758. The court emphasized that such a function is to be performed by an impartial decisionmaker at a hearing at which the union must carry the burden of proving chargeability:

> Considering that the information need not be exhaustive, or even so encompassing as to allow the employees to determine finally whether the union is correct in the allocation, the information supplied by the Union here was adequate to enable the nonunion employees to make a decision whether to object. If they object, the Union will then have the

> burden to demonstrate before an independent decisionmaker that its position is justified.

Id. See also Andrews v. Education Ass'n of Cheshire, 829 F.2d 35, 340 (2d Cir. 1987) ("The [nonmembers'] interpretation of *Hudson*'s auditing requirement is overly broad because it seeks to have the auditor function both as an auditor in the traditional sense and as the independent decisionmaker as to chargeable expenses"); *Tierney v. City of Toledo*, 824 F.2d 1497, 1504-05 (6th Cir. 1987) ("the categorization of any potential expense" as chargeable or nonchargeable is properly "an administrative determination by the independent decisionmaker").[8]

In sum, petitioners' argument that the auditor must verify the union's chargeable/nonchargeable allocation in order to "provide some pre-collection assurance that the amount . . . has been accurately calculated," Petition at 13 n.11, fails because it " 'mistakenly equates the adequacy of the notice with the accuracy of the fee assessment.' " *Hudson v. Chicago Teachers Union*, 922 F.2d at 1314 (citation omitted).

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[8] The agency fee procedure adopted by MTA for determining the amount of the agency fee provides for a hearing before an independent arbitrator selected in accordance with the American Arbitration Association Rules for Impartial Determination of Union Fees ("AAA Rules"). App. MSJC 449-55. The procedure requires the Associations to carry the burden of proving the amount of the fee and to make available to the objecting nonmember employee certain records that they have relied on to justify the fee. No fees may be released from escrow and paid to the Associations until the arbitrator makes his/her final award. The use of an arbitrator selected in accordance with the AAA Rules has been upheld by every court that has addressed the issue. *See, e.g., Ping v. National Education Ass'n*, 870 F.2d 1369, 1372-74 (7th Cir. 1989); *Andrews v. Education Ass'n of Cheshire*, 829 F.2d 335, 340 (2d Cir. 1987); *Damiano v. Matish*, 830 F.2d 1363, 1371 (6th Cir. 1987), and cases cited therein.

In Massachusetts, an objecting nonmember employee has the option of having the Commission decide the amount of the agency fee by filing a prohibited practice charge with the Commission, which is what occurred in this case.

We believe that the foregoing provides a dispositive response to the Petition. Nonetheless, in the interests of completeness, we briefly address the two specific legal grounds that petitioners assert in support of their request for review.

A. First, petitioners argue that the court below erred by failing to apply the traditional "least restrictive means" standard when determining the adequacy of the Associations' financial disclosure. Petition at 12-15. However, other than a string citation of cases that was included in the *Hudson* opinion simply to support the proposition that procedures affecting First Amendment rights generally must be "carefully tailored to minimize the infringement" of such rights, *see* 475 U.S. at 303 n.11, petitioners have pointed to nothing in this Court's decision in *Hudson*, or in any other decision, that requires the Associations to meet such a standard.

While establishing a framework for protecting the constitutional rights of nonmember employees, the decision in *Hudson* does not indicate—and the rationale of the Court does not in any way suggest—that a union operating within this framework must utilize the best possible procedure available. The clear holding of the Court in *Hudson*, repeatedly stated at numerous points in that decision, was only that a union must include in its notice "*an adequate explanation* of the basis for the fee" that would provide nonmember employees with "*sufficient* information to gauge the propriety of the union's fee." *See, e.g.*, 475 U.S. at 306, 307 n.18, 310 (emphasis added).

Indeed, the "least restrictive means" standard proposed by petitioners is incompatible with several specific holdings of this Court in *Hudson*. Thus, the decision in *Hudson* expressly allows a union to calculate the amount of its agency fee with less than absolute precision, *id.* at 307 n.18, to collect fees without a predeprivation hearing, *id.* at 309, 310, to provide expeditious arbitrations

with less than full evidentiary safeguards, *id.* at 308 n.21, and to escrow less than 100% of the fee paid by objecting nonmember employees while challenges to the fee are pending, *id.* at 310. In these and other areas, the Court plainly refused to impose on a union various procedures that would be "less restrictive" of First Amendment interests, and instead chose to consider the practical burdens that such procedures would impose.

The standard proposed by petitioners is, moreover, flatly inconsistent with the balancing approach that has been established by a long line of decisions of this Court in the context of agency fees, including the Court's opinion in *Hudson* itself. In these decisions, the Court repeatedly has emphasized that a union also has a legitimate and important interest at stake: the right to eliminate free-riders by collecting and expending an objecting nonmember employee's fee for expenses that are related to chargeable activities. In recognition of that interest, the Court has cautioned against overbroad remedies that "encroach[] on the legitimate activities or necessary functions of the unions," *Machinists v. Street*, 367 U.S. 740, 774 (1961), and has approved only those remedies protective of objectors' rights that are carefully tailored "lest the important functions of labor organizations . . . be unduly impaired," *Railway Clerks v. Allen*, 373 U.S. at 120. The Court in *Hudson* re-emphasized this need to accommodate competing interests when it stated:

> [T]he objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto *without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities.*

475 U.S. at 302 (citations omitted) (emphasis added). By insisting that the Association must adopt the "least restrictive means" of collecting agency fees, petitioners completely ignore this latter directive.

In short, to meet constitutional standards, the Associations did not have to provide the best possible financial disclosure, Petition at 14, but rather only had to satisfy the standard set forth in *Hudson*—*i.e.*, that a union must provide nonmembers with "an adequate explanation" of the agency fee that includes "the major categories of expenses, as well as verification by an independent auditor," 475 U.S. at 307 n.18, 310. The informational package provided to nonmember employees in this case—which included the basic financial statements, listing the major categories of the Associations' expenses, that were verified by independent auditors—met this standard.

B. Petitioners also contend that this Court should review the decision of the Supreme Judicial Court of Massachusetts because "[t]he decisions of the lower courts are divided in interpreting what this Court meant when it required a union's agency fee disclosure to be 'verifi[ed] by an independent auditor.'" Petition at 15. Far from being divided, however, every state and federal appellate court that has addressed the issue has rejected the position urged by petitioners in this case. *See Dashiell v. Montgomery County*, 925 F.2d at 758; *Ping v. National Education Ass'n*, 870 F.2d at 1369 (7th Cir. 1989); *Gwirtz v. Ohio Education Ass'n*, 887 F.2d at 682 n.3; *Lehnert v. Ferris Faculty Ass'n, MTA/NEA*, 893 F.2d 111, 112 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 2586 (1990); *Andrews v. Education Ass'n of Cheshire*, 829 F.2d at 340; *Antry v. Illinois Educ. Labor Relations Bd.*, 195 Ill. App. 3d 221, 552 N.E.2d 313 (1990), *appeal remanded*, —— N.E.2d —— (Ill. Sept. 13, 1991); *Kuehn v. AFSCME, Council No. 65*, 435 N.W.2d 130 (Minn. App.), *cert. denied*, 493 U.S. 849 (1989).

The most recent court of appeals decision on the point—*Dashiell, supra*—emphasized this unanimity when, in rejecting the nonmember employees' plea that "we also require the auditor to review the Union's initial position taken in attributing expenses to be charged," it declared

that "[w]e, therefore, join the decisions in the Second, Sixth, and Seventh Circuits, which reach the same conclusion." 925 F.2d at 757.

Against this body of consistent appellate court precedent, petitioners cite two district court decisions—*Hohe v. Casey*, 727 F. Supp. 163, 167 (M.D. Pa. 1989), *aff'd in part, vacated in part*, —— F.2d ——, 1991 WL 315,735 (3d Cir. 1992), and *Mitchell v. Los Angeles Unified School District*, 739 F. Supp. 511, *further proceedings*, 744 F. Supp. 938 (C.D. Cal. 1990), *appeal pending*, Ninth Cir. Nos. 90-56180 & 90-56337.[9] But a conflict between decisions of the courts of appeals and district courts is insufficient by itself to warrant the grant of certiorari under Rule 10 of the Supreme Court Rules. It is the function of the courts of appeals to maintain uniformity within their respective circuits and to supervise the decisions of the various district courts. The purpose of certiorari, as this Court recently explained, "is to resolve conflicts among the Circuit Courts of Appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. U.S.*, —— U.S. ——, 111 S. Ct. 1854, 1857 (1991). As we have shown, there is no such conflict as to the Question Presented by the Petition.

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[9] Although both *Mitchell* and *Hohe* were appealed, in neither case was the auditor verification issue raised on appeal. *Mitchell* is now pending before the Ninth Circuit. *Hohe* was decided by the Third Circuit on February 10, 1992, and the court made the following comment with regard to the point at issue:

> [The union] has not appealed the district court's ruling that the independent auditor must verify the breakdown of chargeable and nonchargeable fees [at the explanation stage], and thus we have no reason to review that determination. —— F.2d —— n.9., 1991 WL 315,735, at *18 n.9.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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